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The Survey of New York Practice Table of Contents

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THE SURVEY OF NEW YORK PRACTICE

TABLE OF CONTENTS

DEVELOPMENTS IN THE LAW

Appellate Division, Third Department, rules that injury-in-fact triggers insurance coverage under comprehensive general liability policy in New York when property damage is caused by hazardous material leakage 765

Appellate Division, First Department, recognizes an exception to New York City's sovereign immunity 779

CIVIL PRACTICE LAW AND RULES

CPLR 4510: New York Legislature adopts statute permitting nondisclosure of confidential communications between certified rape crisis counselors and rape victims 789

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW

RPAPL § 732(3): Appellate Division, First Department, holds that RPAPL prohibits routine scheduling of inquests prior to signing default judgments in residential summary nonpayment proceedings 799

SURROGATE'S COURT PROCEDURE ACT

SCPA § 1407: New York Court of Appeals rules that contract to make will irrevocable is unenforceable against survivor when will is presumed revoked 811

INTRODUCTION*

In this third issue of Volume 68, *The Survey* discusses recent developments in New York law. First, in *Cortland Pump &*

* *The Survey* uses the following abbreviations:

New York Civil Practice Law and Rules (McKinney)	CPLR
New York Civil Practice Act	CPA
New York Criminal Procedure Law (McKinney)	CPL
New York Code of Criminal Procedure	CCP
Real Property Actions and Proceedings Law (McKinney)	RPAPL

Equipment, Inc. v. Firemen's Insurance Co., the Appellate Division, Third Department, held that the "injury-in-fact" theory governs coverage under comprehensive general liability ("CGL") policies when property damage results from contamination by hazardous materials. The injury-in-fact theory provides that coverage is triggered when the damage actually occurs, irrespective of the time of initial exposure to the wrongful agent or the discovery of the injury. The court held that the supposition reflects the plain meaning of GCL policies and noted that an insurer's duty to defend is broader than its obligation to indemnify.

Second, in a decision that may prove to narrow the boundaries of sovereign immunity, the Appellate Division, First Department, in *Clinger v. New York City Transit Authority*, held that the Transit Authority may be found liable for the assault of a passenger by a third party, despite the absence of a special relationship between it and the claimant. Employing the widely criticized governmental-proprietary distinction, the court ruled that a governmental entity may be held liable in negligence if it affirmatively facilitates the commission of a crime while acting in a proprietary capacity.

Third, the New York Legislature, with the enactment of section 4510 of the CPLR, joined an emerging trend among the states by establishing a privilege for confidential communications between rape crisis counselors and rape victims. In conjunction with CPL 60.76, a defendant who seeks disclosure of material prohibited by CPLR 4510 must support any request with specific factual allegations. The CPLR statute is likely to be challenged on constitutional grounds, as it constrains a defendant's Sixth Amendment right to confront witnesses.

Fourth, in *Brusco v. Braun*, the Appellate Division, First Department, held that the practice of routinely scheduling a special inquest prior to rendering a default judgment in residential summary nonpayment proceedings violates section 732(3) of the

Domestic Relations Law (McKinney)	DRL
Estates, Powers and Trusts Law (McKinney)	EPTL
General Business Law (McKinney)	GBL
General Municipal Law (McKinney)	GML
General Obligations Law (McKinney)	GOL
D. Siegel, New York Practice (1991)	SIEGEL
Surrogate's Court Procedure Act	SCPA
Weinstein, Korn & Miller, New York Civil Practice (1989)	WK&M
<i>The Survey of New York Practice</i>	<i>The Survey</i>

RPAPL. The court stated that the special inquest is unnecessary because the RPAPL provides several safeguards to ensure that a tenant is notified prior to being evicted. In light of these protections, the court ruled that the additional stage of review is contrary to the purpose of Article 7 of the RPAPL, which was enacted to increase the speed and reduce the expense of actions to recover real property.

Finally, in *In re Cohen*, the New York Court of Appeals held that a contractual agreement could not be specifically enforced against a surviving spouse to uphold the provisions of a reciprocal will when the will of the deceased spouse was presumed revoked during his lifetime. The court found the statutory presumption of revocation, which arises when a will known to be in the testator's possession cannot be found after a diligent search, to be controlling. Thus, the decedent's estate was distributed through New York intestacy laws. In reversing, the court held that the enforcement of the memorandum agreement through the imposition of a constructive trust depended on the existence of a valid will.

The members of Volume 68 hope that *The Survey's* treatment of these developments in New York law will be of interest and value to both bench and bar.

